

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DAVID A. BREAUX,

Petitioner,

v.

WARDEN of the California State Prison at
San Quentin,

Respondent.

NO. 2:93-cv-00570-JAM-DAD

Date: To be determined

Time: To be determined

Ctrm: Hon. Dale A. Drozd, Magistrate Judge

DEATH PENALTY CASE

**PETITIONER'S STATEMENT REGARDING
SCOPE OF EVIDENTIARY HEARING**

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1 In an order filed June 21, 2013, this Court directed both parties to file statements regarding
 2 “the scope of the evidentiary hearing necessary to resolve the outstanding claims in this action.”
 3 (See Doc. 241 at 2.) The Court issued its directive “in keeping with the order of July 10, 2012, and
 4 the previous orders referenced therein.” Ibid. The July 2012 order had directed the parties to “file
 5 statements regarding the scope of the evidentiary hearing discussed by the parties at the November
 6 7, 2005 status conference and set out in the undersigned’s January 6, 2004 findings and
 7 recommendations.” (See Doc. 226 at 19, referencing Docs. 200 and 166, respectively.)

8 In the 2004 Findings and Recommendations, this Court had recommended that summary
 9 judgment be denied as to Claims C, L, N, O, S-5, T (in part), V (in part), W and X. (See Doc. 166
 10 at 259.) District Judge Levi subsequently adopted those recommendations. (See Doc. 181 at 4.)

11 Also in the 2004 Findings and Recommendations, this Court recommended that summary
 12 judgment be granted in favor of respondent as to (inter alia) Claims S-13 and U (see Doc. 166 at
 13 259), but Judge Levi did not adopt those recommendations (see Doc. 181 at 4).

14 Thus, the remaining claims in this cases can be grouped into the following categories:¹

- 15 1. Claims C: ineffective assistance of counsel for failing to present penalty-phase
 16 evidence of remorse.
- 17 2. Claims C & W: ineffective assistance of counsel with respect to penalty phase
 18 mitigation.
- 19 3. Claim L: petitioner’s mental incompetence to assist counsel and related ineffective
 20 assistance of counsel.
- 21 4. Claim N: defense counsel’s concession of guilt as to the non-homicide charges.
- 22 5. Claim O: petitioner’s absence from certain court proceedings.
- 23 6. Claim S-5: standard of proof re aggravating factors relied on at penalty phase.
- 24 7. Claim S-13: the failure of California death penalty scheme to narrow the class of
 25 death-eligible offenders.
- 26 8. Claims T (in part) and U: misconduct, bias, and/or incompetence on the part of
 27 juror Peinado.

28 ¹ The characterizations of the listed claims are shorthand oversimplifications, intended simply to identify the general type of claims, and are not in any way intended to increase or decrease the scope of the claims as pleaded and litigated in this Court.

9. Claims T (in part) and U: ineffective assistance of counsel with respect to jury selection.
10. Claim V (in part): bailiff misconduct during jury's deliberations..
11. Claim V (in part): misconduct on the part of juror Alvarado for consulting with minster during penalty phase deliberations.
12. Claim X: cumulative prejudice

At the November 2005 status conference mentioned above, the Court adopted respondent's suggestion that no formal motion for an evidentiary hearing was necessary and that, with two possible exceptions, the case would proceed to evidentiary hearing on the remaining claims. (Doc. 200 at 2-4. [transcript of Nov. 7, 2005 proceedings]; Doc. 190 at 3 [respondent's 2005 status conference statement].)

The two potential exceptions were Claims S-5 and S-13. With respect to Claim S-5 (standard of proof regarding penalty-phase aggravating factors), it was agreed at the November 2005 hearing that this claim would be addressed in connection with the final briefing, after evidentiary hearing. (Doc. 200 at 2.)

As for Claim S-13 (failure to narrow), the parties agreed at the same hearing that the claim would be deferred with the possibility that it could be eventually submitted on evidence presented in other cases. (Doc. 200 at 2.) Then, in 2012, when this Court issued findings and recommendations recommending the dismissal of Claim I (which recommendations were subsequently adopted), the Court added an order again indicating its awareness of other habeas cases with the same claim and directing petitioner to inform the court how he wished to proceed on the claim in his case. (See Doc. 226 at 19.) In response to that order, petitioner advised the Court that

petitioner wishes to submit Claim S-13 on the basis of certain testimonial and documentary evidence presented in *Frye v. Calderon*, E.D. No. S-99-00628 LKK-CKD, and *Ashmus v. Ayers*, N.D. No. 93-CV-00594-THE. Most, if not all, of the evidence to be submitted is listed in the exhibit list submitted to this Court in *Webster v. Ornoski*, E.D. No. S-93-0306 LKK-DAD, a copy of which is attached. Although a final decision has not been made, petitioner may seek to submit a few additional exhibits from the *Frye* or *Ashmus* cases. It is the understanding of petitioner's counsel that all of this material can be presented to the Court in digital form.

1 In addition to the evidence just mentioned, petitioner also wishes to
2 submit briefing on the merits of the claim. Petitioner proposes that
3 he file an opening brief, respondent an opposition brief, and
4 petitioner file a reply.

(Doc. 229 at 2.)

5 Finally, although the matter was not discussed in any of the earlier proceedings, petitioner
6 suggests that Claim W (cumulative prejudice) is, like Claim S-5, not suited to an evidentiary
7 hearing and should be addressed in the post-hearing briefing in the case. If those two claims are
8 handled in that manner, then there are ten categories of claims remaining for evidentiary hearing —
9 items 1 through 5 and 7 through 11 in petitioner's list above — with one of the ten likely to be
10 submitted upon evidence produced in other cases rather than be the subject of a new evidentiary
11 hearing in this case (Claim S-13).

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13 Dated: July 8, 2013

Respectfully submitted,

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